

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Appeal of the  
Invasive Species/Infested Waters  
Civil Citation CV 201382 Issued to  
David W. Alden

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND RECOMMENDATION**

This matter came before Administrative Law Judge Steve M. Mihalchick for a prehearing telephone conference call on September 19, 2013, pursuant to a Notice of Prehearing Conference and Notice of Hearing that was issued on September 9, 2013. Conservation Officer Bret Grundmeier (CO Grundmeier) appeared on behalf of the Department of Natural Resources (DNR) without counsel. Appellant David W. Alden appeared on his own behalf without counsel.

During the telephone conference on September 19, 2013, the parties agreed to treat the telephone conference as the formal hearing on the citation. Sworn testimony was taken and argument was presented during the hearing. The record closed that day upon adjournment of the hearing.

**STATEMENT OF THE ISSUES**

1. Whether Appellant violated Minn. Stat. § 84D.10, subd. 4(b), by failing to have a drain plug removed or open when transporting water-related equipment.
2. Whether \$100 is the appropriate civil penalty for the violation under Minn. Stat. § 84D.13, subd. 5(a)(6).

**SUMMARY OF RECOMMENDATION**

The Administrative Law Judge concludes that Appellant committed a violation of Minn. Stat. § 84D.10, subd. 4(b), and that a civil penalty of \$100 is not unreasonable. Therefore, the Administrative Law Judge recommends that the Commissioner affirm the citation and fine.

Based on the proceedings herein, the Administrative Law Judge makes the following:

## FINDINGS OF FACT

1. Appellant lives in Wisconsin, but often fishes in Minnesota at Lake Mille Lacs. He is familiar with Minnesota's fishing laws. On July 19, 2013, he was staying at the Wharf, which is on the east side of the lake. Because of high winds there, he and his companions towed his boat up to the north end to fish. After fishing for a few hours, he loaded his boat on the trailer and headed south on County Road 18 toward the Wharf. Appellant forgot to pull the bilge drain plug before he drove off.<sup>1</sup>

2. Conservation Officers were conducting a road check on County Road 18 that day watching for violations of laws related to transporting aquatic invasive species in boats and other water-related equipment in Minnesota. They had received strong directives from DNR officials to make protection of Minnesota lakes a priority. The road check was located along the northeast side of Lake Mille Lacs near Malmo, Minnesota, in Aitkin County.<sup>2</sup>

3. Because he was pulling a boat, Appellant was pulled over at the check point and his boat was checked. CO Grundmeier observed that the bilge drain plug was in place, in violation of Minn. Stat. § 84D.10, subd. 4(b). He had a discussion with Appellant. He pulled out Appellant's drain plug. No water came out; as CO Grundmeier observed, the boat was dry.<sup>3</sup>

4. Based upon his observations, CO Grundmeier issued Citation No. CV 201382 to Appellant for a violation described as, "Fail to pull plug." The penalty imposed was \$100.<sup>4</sup>

5. Appellant admitted at the time, and during the telephone hearing, that he had simply forgotten to pull the plug when he loaded the boat at the north end of the lake and then drove south on County Road 18. He was apologetic for his memory lapse. He noted that he had never previously violated Minnesota's laws and felt that he should have been given a warning for this first time offense. He testified that, nonetheless, he understood the law, would pay the penalty imposed, and would continue fishing in Minnesota.<sup>5</sup>

6. Appellant timely appealed the citation in a letter to the Commissioner of the DNR.<sup>6</sup>

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

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<sup>1</sup> Appeal letter and Testimony (Test.) of D. Alden.

<sup>2</sup> Citation No. CV 201382 attached to DNR request for assignment of an Administrative Law Judge; Test. of B. Grundmeier.

<sup>3</sup> Test. of B. Grundmeier and D. Alden.

<sup>4</sup> Citation No. CV 201382; Test. of B. Grundmeier.

<sup>5</sup> Test. of D. Alden.

<sup>6</sup> DNR request for assignment of an Administrative Law Judge.

## CONCLUSIONS OF LAW

1. This matter is properly before the Administrative Law Judge and the Commissioner of Natural Resources pursuant to Minn. Stat. §§ 14.50, 84D.13, subd. 8, and 116.072, subd. 6.

2. Minnesota Statutes section 84D.10, subdivision 4(b) requires that drain plugs, bailers, valves, or other devices used to control the draining of water from ballast tanks, bilges, and live wells must be removed or opened while transporting water-related equipment. “Water-related equipment” includes boats.<sup>7</sup>

3. Conservation Officers are authorized to issue warnings or civil citations to persons who violate Minn. Stat. § 84D.10, subd. 4(b).<sup>8</sup> If a civil citation is issued, the statutorily-prescribed fine for a violation of Minn. Stat. § 84D.10, subd. 4(b) is \$100.<sup>9</sup> Therefore, the civil citation and penalty that CO Grundmeier issued to Appellant was authorized by law.

4. Pursuant to Minn. Stat. § 84D.13, subd. 8, an appeal of a civil citation shall be brought under the procedures set forth in Minn. Stat. § 116.072, subd. 6, provided that a hearing is requested within 15 days after receipt of the citation.

5. Appellant filed a timely appeal and request for hearing.

6. At a hearing on a violation of Minn. Stat. ch. 84D, the burden is on the DNR to show by a preponderance of the evidence that the appellant violated the statute cited.<sup>10</sup>

7. Appellant violated Minn. Stat. § 84D.10, subd. 4(b), by transporting a boat without opening or removing its drain plug.

8. Pursuant to Minn. Stat. § 116.072, subd. 6(c), the Administrative Law Judge may not recommend a change in the amount of the proposed penalty unless the judge determines that, based upon the factors in subdivision 2,<sup>11</sup> the amount of the penalty is unreasonable.

9. The penalty amount of \$100 is not unreasonable.

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<sup>7</sup> Minn. Stat. § 84D.02, subd. 18a (2012).

<sup>8</sup> Minn. Stat. § 84.13, subd. 4 (2012).

<sup>9</sup> Minn. Stat. § 84D.13, subd. 5(a)(6) (2012).

<sup>10</sup> Minn. R. 1400.7300, subp. 5 (2012).

<sup>11</sup> Minn. Stat. § 116.072, subd. 2 (2012), provides that, in determining the amount of penalty, the commissioner may consider: (1) the willfulness of the violation; (2) the gravity of the violation, including damage to humans, animals, air, water, land, or other natural resources of the state; (3) the history of past violations; (4) the number of violations; (5) the economic benefit gained by the person by allowing or committing the violation; and (6) other factors as justice may require, if the commissioner specifically identifies the additional factors in the commissioner's order.

10. For purposes of Minn. Stat. § 116.072, subd. 6(d), Appellant's request for hearing was not solely for purposes of delay and was not frivolous.

Based on the Conclusions of Law, and for the reasons set forth in the Memorandum below, the Administrative Law Judge makes the following:

### RECOMMENDATION

The Administrative Law Judge recommends that Invasive Species/Infested Waters Civil Citation No. CV 201382 issued to Appellant be **AFFIRMED**.

Dated: October 15, 2013

s/Steve M. Mihalchick  
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STEVE MIHALCHICK  
Administrative Law Judge

### NOTICE

Pursuant to Minn. Stat. § 116.072, subd. 6(e), the Commissioner may not issue a final order until at least five days after receipt of the Report of the Administrative Law Judge. The persons to whom the order is issued may, within those five days, comment to the Commissioner, and the Commissioner will consider the comments. The final order of the Commissioner may be appealed pursuant to Minn. Stat. §§ 14.63 and 14.69.

### MEMORANDUM

In an appeal of a DNR civil citation, the burden of proof is on the Department to prove by a preponderance of the evidence that a violation of law occurred.<sup>12</sup> A preponderance of the evidence means that it must be established by a greater weight of the evidence.<sup>13</sup> "It must be of a greater or more convincing effect and ... lead you to believe that it is more likely that the claim...is true than...not true."<sup>14</sup> The preponderance of the evidence standard is less than the clear and convincing standard, and less than the proof beyond a reasonable doubt standard used in criminal trials.<sup>15</sup>

Here, a preponderance of the evidence establishes that Appellant transported his boat on Aitkin County Road 18 while its bilge plug was inserted. He was observed doing so by CO Grundmeier. Appellant admits that he did so. Therefore, the DNR has met its burden of proving that Appellant violated Minn. Stat. § 84D.10, subd. 4(b).

<sup>12</sup> Minn. R. 1400.7300, subp. 5.

<sup>13</sup> 4 Minnesota Practice, CIV JIG 14.15 (2012).

<sup>14</sup> *State v. Wahlberg*, 296 N.W.2d 408, 418 (Minn. 1980).

<sup>15</sup> *State v. Shamp*, 422 N.W.2d 520, 525 (Minn. Ct. App. 1988), *citing Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978), *review denied* (Minn. June 10, 1988).

Appellant admitted that he towed his boat along Aitken County Road 18 with the drain plug in, which he simply forgot to remove. He suggested that he should have received only a warning because this was a first time offense and no harm was caused because his boat was dry and he was going to be returning to a different spot on the same lake.

The choice between issuing a warning and a civil penalty is given to the Conservation Officer by Minn. Stat. § 84D.13, subd. 4. The violation was sufficiently significant to justify the civil citation. Moreover, the check point was part of a DNR campaign of check point enforcement to make the law more well-known to boaters.

While a \$100 fine is significant, it is the amount specified by Minn. Stat. § 84D.13, subd. 5(a)(6), and is reasonable in relation to the harm that the DNR seeks to prevent. The civil citation and fine should be affirmed.

**S. M. M.**